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Supreme Court, U.S.
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Nº. 08-61

In The
Supreme Court of the United States

FLAMOR DJOKOVIC,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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July, 2008

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QUESTIONS PRESENTED FOR REVIEW

1. The Sixth Circuit affirmed the denial of Petitioner's asylum claim on the narrow ground of changed country conditions. Did the Sixth Circuit depart from its own and agency precedent and the regulations by failing to consider whether Petitioner is entitled to humanitarian asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(B), because there is a reasonable possibility that he would suffer "other serious harm" in his native Montenegro?

2. The Immigration Judge issued two decisions. The first decision, which was unsigned, was provided to the parties during the appeal to the Board of Immigration Appeals. The administrative record, however, contains a second decision. This decision is signed and contains numerous hand-written changes to the first decision. Did the Board of Immigration Appeals' reliance on the second decision deprive Petitioner of due process and render the agency proceedings fundamentally unfair?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Flamor Djokovic respectfully petitions that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on April 14, 2008. The agency created a hidden moving target by providing an unsigned and unedited decision to the parties while at the same relying on a signed and edited decision in the administrative appeal process. This deprived Mr. Djokovic, a young asylum applicant, of due process and a fair hearing.

The Sixth Circuit further erred by failing to abide by the regulations, agency precedent, and its own precedent. After affirming the denial of Mr. Djokovic's asylum application on the basis of changed country conditions, the court should have determined whether Mr. Djokovic was entitled to humanitarian asylum. 8 C.F.R. § 1208.13(b)(1)(iii)(B). If the court could not make this determination, it should have remanded to the agency.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App., *infra*, A1, is unreported. The opinion of the Board of Immigration Appeals, App., *infra*, B1, is unreported. The oral decisions of the Immigration Judge, App., *infra*, C1, are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, A1, was entered on April 14, 2008. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

At all times relevant to this case, 8 U.S.C. § 1158 provided in relevant part:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

At all times relevant to this case, 8 C.F.R. § 1003.1 provided in relevant part:

(e)(3) Merits review. In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the

issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

At all times relevant to this case, 8 C.F.R. § 1003.5 provided in relevant part:

(a) Appeal from decision of an immigration judge. If an appeal is taken from a decision of an immigration judge, the record of proceeding shall be forwarded to the Board upon the request or the order of the Board. Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location. The Chairman and the Chief Immigration Judge shall determine the most effective and expeditious way to transcribe proceedings before the immigration judges, and take such steps as necessary to reduce the time required to produce transcripts of those proceedings and improve their quality.

At all times relevant to this case, 8 C.F.R. § 1208.13 provided in relevant part:

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. The first question involves an applicant's eligibility for humanitarian asylum. If an applicant is found ineligible for asylum on the basis of changed country conditions, the agency and the Sixth Circuit require the adjudicator to then determine if the applicant is entitled to asylum for humanitarian reasons. The lower court failed to undertake this analysis in this case.

The second question is whether an administrative appellate court must provide a litigant with a copy of the decision that it is reviewing. In this case, the Board of Immigration Appeals provided the parties with an unsigned and unedited copy of the Immigration Judge's decision but, as was later learned, it based its decision upon

a review of an edited and signed decision. At minimum, the Sixth Circuit should have remanded the case to the agency to allow it to address its handling of this case.

(ii) Factual Background

Mr. Djokovic was born on January 2, 1985 in Tuzi, Yugoslavia, in what is now Montenegro [1] He is an ethnic Albanian. (AR 193). In school, he was prohibited from learning Albanian history, culture, or language. (AR 194-195).

Mr. Djokovic's father, Luigi Djokovic ("Luigi"), was a staunch supporter of Albanians in Kosovo and of their struggle to be free from Serbian aggression. (AR 175). For as long as he could remember, Luigi helped send food to Kosovo and sheltered Albanians who were fleeing that region. *Id.* Mr. Djokovic believes that his father may have been arrested in early 1998 while trying to take supplies into Kosovo. (AR 215).

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[1] When Mr. Djokovic entered the United States, the country was called the Federal Republic of Yugoslavia. After 2003, it was called Serbia and Montenegro. This entity ceased to exist on June 3, 2006 when Montenegro declared its independence. https://www.cia.gov/library/publications/the-world-factbook/geos/mj.html (visited June 30, 2008). Serbia and Montenegro are now separate countries. It is unclear as to which, if any, of these two countries Mr. Djokovic is a citizen of.

Mr. Djokovic was too young to belong to a political organization but he tried "to do whatever [he] could to help." (AR 176).

The police and army searched for Luigi several times. *Id.* On June 6, 1999, more than ten Montenegrin soldiers came to his uncle's house to search for Luigi. (AR 174, 180). Mr. Djokovic was there watching television at the time. *Id.* Mr. Djokovic believed that his father was in Kosovo; he was for his father because of the fighting in Kosovo at the time. (AR 177). Mr. Djokovic tried to escape when the soldiers starting beating his uncle. (AR 174). The soldiers caught Mr. Djokovic and took him and his uncle to a military prison. *Id.*

En route to the prison, the soldiers asked them about Luigi. (AR 181). They also questioned why Luigi tried to help ethnic Albanians. *Id.* Dissatisfied with their answers, one of the soldiers hit his uncle. (AR 182).

At the prison, the soldiers placed Mr. Djokovic and his uncle into separate small, dark rooms. (AR 183). About 90 minutes later, two soldiers entered Mr. Djokovic's room and forced him to sit facing away from the door. *Id.* A third soldier, who Mr. Djokovic could not see, asked if Luigi was his father. *Id.* He then asked where Luigi was. (AR 185). Mr. Djokovic lied and said that he did not know where his father was. *Id.*. The third soldier ordered another soldier to hit him. *Id.* Mr. Djokovic still refused to reveal his father's location, so the soldiers hit him again. *Id.* The

third soldier eventually left. (AR 186). The remaining two soldiers knocked him to the ground and hit him several times before they left. *Id.*

About four or five hours later, the soldiers returned and told him to leave the prison. (AR 189). They told him to tell his father to turn himself in. (AR 190). A neighbor saw Mr. Djokovic walking home and drove him the rest of the way. (AR 190-191). His family was too scared to take him to the hospital. (AR 192-193). Mr. Djokovic dropped out of school because he was afraid to leave his house. (AR 192). His father came home about three weeks later. (AR 191).

About four to six weeks later, his parents smuggled him into Albania. (AR 196). He stayed with his father' friend, Sokol. (AR 198). Around August 28, 1999, he entered Canada as part of a youth soccer team headed to Canada. (AR 199). He entered the United States in the back of a semi-truck on about September 9, 1999. *Id.* The smugglers kept the fake passport that he used to enter Canada. (AR 200-201). The rest of the soccer team remained in Canada. (AR 202).

When he last spoke to his father, his father was in Albania and his mother was in a hospital. (AR 171-172). His father was still in hiding because he was wanted for his role in helping Albanians flee Kosovo. (AR 205-206). His father moves between Albania, Kosovo, and Macedonia, but does not really have a home. (AR 218). Shortly

before the hearing, his mother was moved from a hospital in Albania to one in Croatia. (AR 233).

The Kosovo Liberation Army ("KLA") confirmed that Luigi helped refugees from Kosovo. (AR 508-509). Luigi obtained this document from the KLA and asked Mr. Djokovic's cousin to bring it to the United States. (AR 206-208).

Ethnic, religious, and political violence plague Serbia and Montenegro. The government continued its practice of refusing to cooperate in international war crimes investigations and protected several suspected war criminals. (AR 276, 286).

Over the past several years, several prominent, anti-government journalists were murdered, with the government being suspected in the murder or cover-up. (AR 277). Amnesty International accused Serbian and Montenegrin police officers of torturing and abusing detainees. (AR 309, 315-327).

In 1999, the State Department reported that the Yugoslav Army stationed in Montenegro was not under control of the local authorities and made repeated attempts to usurp control from the civilian authorities. (AR 485). The army committed human rights abuses in Montenegro. *Id.* Both civilian police and federal soldiers committed human rights violations, abused people, and violated the rights of Montenegrins. *Id.* The army harassed and threatened ethnic Albanians by

conducting live fire practice near their homes. (AR 486). Discrimination continued to be a problem. (AR 398).

Mr. Djokovic fears that if he returns to Montenegro, he will be punished because of his father's activities. (AR 210).

(iii) Agency Proceedings

Flamor Djokovic entered the United States without inspection on September 9, 1999. (AR 812). Assisted by a community organization engaged in the unauthorized practice of law, he filed a timely asylum application with the Immigration and Naturalization Service ("INS")[2] in March of 2000. (AR 748-760). The INS referred this application to the Immigration Court.

On April 19, 2000, the INS issued a Notice to Appear alleging that Mr. Djokovic was subject to removal as an alien who entered the United States

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[2] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

without being admitted or paroled, in violation of 8 U.S.C. § 1182(a)(6)(A)(i). (AR 812).

In proceedings that began in New York, Mr. Djokovic conceded his removability and renewed his applications for asylum, withholding of removal, and protection under CAT. (AR 137). The court later granted his motion for a change of venue to Detroit, Michigan. (AR 148).

The Immigration Judge ("IJ") conducted his merits hearing on August 30, 2005 in Detroit, Michigan. At the conclusion of the hearing, the IJ denied his applications for relief and ordered him removed to Serbia and Montenegro. (AR 82). The IJ did not believe Mr. Djokovic. (AR 64-74). She also concluded that he did not submit sufficient corroborating evidence, did not suffer past persecution, lacked a well-founded fear of persecution, and was ineligible for humanitarian asylum. (AR 74-80).

Mr. Djokovic timely appealed to the Board of Immigration Appeals ("BIA"). (AR 36-40). The BIA adopted and affirmed the IJ's decision on March 29, 2007. App. B1. Specifically, the BIA agreed with the IJ's conclusions that Mr. Djokovic was not credible, did not suffer past persecution, lacks a well-founded fear of future persecution, and is ineligible for CAT protection. *Id.*

(iv) The Sixth Circuit's Decision

Mr. Djokovic timely petitioned for review from the BIA's decision. On April 14, 2008, the Sixth Circuit denied Mr. Djokovic's appeal. Djokovic v. Mukasey, No. 07-3499 (6th Cir. Apr. 14, 2008) (App. A1). The court criticized the BIA's handling of the case because the Administrative Record contained two decisions from the IJ, an unedited and unsigned version and one that was edited and signed. The BIA sent the parties the former decision but may have based its decision on the latter decision. Still, the Sixth Circuit did not remand because it concluded that this did not prejudice Mr. Djokovic. The court also affirmed the denial of Mr. Djokovic's applications on the basis of changed country conditions.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with the decisions from that court as well as from the agency. When the court concluded that Mr. Djokovic would not be persecuted in Montenegro, it was required to then determine whether he was eligible for humanitarian asylum or, if it could not make that determination based on the record, to remand to allow the agency to consider the issue in the first instance. The court considered his claim under one prong, the severity of the past persecution, but it did not consider his claim under the other prong, which is whether he would suffer other serious harm in Montenegro. 8 C.F.R. § 1208.13(b)(1)(iii)(B).

The agency's failure to provide the parties with a copy of the decision being appealed and instead providing the parties with an unedited version of that decision is a clear due process violation and it made the proceedings fundamentally unfair.

I. Agency and Sixth Circuit Precedent Require a Court to Consider Whether there is a Reasonable Possibility that an Asylum Applicant who Lacks a Well-Founded Fear of will Suffer Other Serious Harm Upon Removal.

The Sixth Circuit concluded that conditions had improved in Montenegro such that Mr. Djokovic no longer possessed a well-founded fear of persecution. The court then affirmed the agency's finding that the persecution that Mr. Djokovic suffered was not so severe as to qualify him for humanitarian asylum. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(A). However, the court failed to consider whether Mr. Djokovic is entitled to humanitarian asylum based not on the severity of the past persecution but because there is a reasonable possibility that he will suffer "other serious harm" in Montenegro. 8 C.F.R. § 1208.13(b)(1)(iii)(B).

A. Legal Standard

The Attorney General has the discretion to grant asylum to a "refugee." 8 U.S.C. § 1158(a).

Refugees are aliens who are unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

An asylum applicant bears the burden of establishing that he qualifies as a refugee "either because he has suffered actual past persecution or because he has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b). The applicant's testimony, if credible, "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 1208.13(a). The alien must subjectively "fear that he will be persecuted upon return to his country, and he must present evidence establishing an objective situation under which his fear can be deemed reasonable." Mikhailevitch v. INS, 146 F.3d 384, 389 (6th Cir. 1998). An alien can have a well-founded fear of an event happening where there is as little as a one-in-ten chance of it taking place. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1217 (1987).

An alien who satisfies his burden of establishing past persecution is presumed to have a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(i). To rebut this presumption, the Department of Homeland Security ("DHS") must prove by a preponderance of the evidence that conditions in the alien's country "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted were he to

return." *Id.* The DHS must prove that the "change negates the particular applicant's well-founded fear of persecution." Mapouya v. Gonzales, 487 F.3d 396, 412 (6th Cir. 2007).

An applicant who has suffered past persecution is eligible for humanitarian asylum in the absence of a well-founded fear of persecution in one of two circumstances: the past persecution was so sever that there are compelling circumstances for the applicant's unwillingness or inability to return, or if he "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. §§ 1208.13(b)(1)(iii)(A), (B).

B. Humanitarian Asylum

An asylum applicant who has suffered past persecution "is not barred from a grant of asylum" in the absence of a well-founded fear of persecution if "there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(B). A "reasonable possibility" of future harm can exist where there is as little as a ten percent chance of the event happening. Cardoza-Fonseca, 107 S. Ct. at 1217.

Unfortunately, there is very little administrative or judicial guidance as to what constitutes "other serious harm." The implementing regulations indicate that it is "harm that is not inflicted on account of race, religion,

nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution." 65 Fed. Reg. 76121, 76127 (2000).

The Attorney General recognized that it was "overly restrictive" to limit humanitarian asylum only to applicants who suffered particularly severe persecution. 63 Fed. Reg. 31945, 31947 (June 11, 1998). "For example, there may be cases where it is appropriate to offer protection to applicants who have suffered persecution in the past and who are at risk of future harm that is not related to a protected ground." Id. This "general humanitarian principle" acknowledges that a refugee who "has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, *in view of his past experiences, in the mind of the refugee*." Matter of Chen, 20 I. & N. Dec. 16, 19 (BIA 1989) (internal citations omitted) (emphasis added).

The Ninth Circuit remanded a case to the BIA based, in part, on the State Department's conclusion that the human rights record in an applicant's home country was "poor" with "serious" human rights abuses occurring. Mohammed v. Gonzales, 400 F.3d 785, 801 (9th Cir. 2005).

Given the absence of a regulatory or administrative framework for analyzing these

claims, the Sixth Circuit has previously remanded cases to allow the BIA to address asylum applicants' eligibility for humanitarian asylum under the "other serious harm" prong. Liti v. Gonzales, 411 F.3d 631, 641-42 (6th Cir. 2005). The BIA has likewise stressed the importance of having IJ's issue complete decisions addressing all aspects of an asylum claim, including credibility, past persecution, well-founded fear of future persecution, and humanitarian asylum. Matter of D-I-M-, 24 I. & N. Dec. 448, 450 (BIA 2008).

C. The Sixth Circuit Failed to Consider Whether there is a Reasonable Possibility that Mr. Djokovic will Suffer Other Serious Harm in Montenegro

The Sixth Circuit, although it considered (and rejected) whether Mr. Djokovic was eligible for humanitarian asylum based on the severity of the past persecution, it did not consider whether there is a reasonable possibility that he would suffer "other serious harm." Mr. Djokovic raised this claim with the agency and with the Sixth Circuit.

The court should have addressed this claim because, if granted, it would entitle Mr. Djokovic to remain in the United States and would protect him from being removed to the country he fled as a child in fear for his life. At minimum, because the agency did not address this claim, the court should have remanded to allow it to do so. Gonzalez v.

Thomas, 126 S. Ct. 1613, 1615 (2006); INS v. Ventura, 537 U.S. 12, 16-17 (2002).

The record, including reports from the State Department, establishes the serious harm that Mr. Djokovic faces in Montenegro. Ethnic, religious, and political violence remain a serious problem in Montenegro and its Balkan neighbors. The government continued its practice of refusing to cooperate in international war crimes investigations and protected several suspected war criminals. (AR 276, 286).

Over the past several years, several prominent, anti-government journalists were murdered, with the government being suspected in the murder or cover-up. (AR 277). Amnesty International accused Serbian and Montenegrin police officers of torturing and abusing detainees. (AR 309, 315-327). The army harassed and threatened ethnic Albanians by conducting live fire practice near their homes. (AR 486). Discrimination continued to be a problem. (AR 398).

II. Mr. Djokovic's Asylum Proceedings were Fundamentally Unfair Because the BIA Provided the Parties with an Unedited IJ Decision but the Record also Contains an Edited IJ Decision

The Administrative Record contains two Oral Decisions from the IJ, one that is signed and contains handwritten changes (AR 50-82) and one

that is not signed and does not contain any changes (AR 85-117). On appeal to the BIA, the BIA provided the parties with only the unsigned and unedited decision. It is not clear which, if any, decision the BIA reviewed. Because the IJ announced her decision orally at the conclusion of Mr. Djokovic's merits hearing, the parties had to rely on the BIA to provide them with an accurate decision.

The BIA is required to provide the parties with an accurate record of the proceedings. 8 C.F.R. §§ 1003.1(e)(3), 1003.5(a). If the BIA based its decision on the signed and changed decision, then the parties were deprived of due process and the BIA violated its own regulations.

The changes made to the signed Oral Decision are numerous and are significant. By counsel's count, thirty of the thirty-three-page decision contained at least one change. While some of the changes were undoubtedly grammatical or minor, most of the changes were substantive in nature. Thus, the decision that the parties heard in open court and were provided on appeal was not the decision that the BIA was likely considering.

There are many significant changes. For example, the change in the second paragraph on AR 62 completely changes the meaning of a sentence discussing the legal definition of torture. The same holds true for the last sentence on AR 64, which discusses under what circumstances the omissions from an asylum application or testimony

could support an adverse credibility finding. On AR 74, the IJ changed the dates in her summary of Mr. Djokovic's statements concerning the government's efforts to find his father. On AR 67, the IJ altered the meaning of a sentence discussing Mr. Djokovic's credibility. The original decision referred to whether "they," meaning the Djokovic family, belonged to any groups but the new sentence now only referred to Mr. Djokovic. Other changes, such as those on AR 70 and 72-73 likewise change the meanings of the sentences.

The Seventh Circuit addressed a similar situation in Mamedov v. Ashcroft, 387 F.3d 918 (7th Cir. 2004). That court criticized the practice of making handwritten changes to a decision during appeal because jurisdiction is transferred from the IJ to the BIA. Id. at 919-20. This "bad practice" requires litigants to strike at a moving target. Id. at 920.

Unlike the situation in Mamedov, the parties in this case did not even have a benefit of a moving target. Instead, the BIA was playing a shell game with the parties. The parties were aiming at a decoy target.

Aliens present in the United States, even those "whose presence ... is unlawful, involuntary, or transitory," are protected by the Fifth Amendment due process clause. Mathews v. Diaz, 426 U.S. 67, 77 (1976). A "respondent has a Fifth Amendment due process right to a fair immigration hearing." Matter of Assaad, 23 I. & N. Dec. 553,

558 (BIA 2003). Asylum applicants have the "constitutionally protected right to petition our government for political asylum." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982). Asylum hearings are "cooperative," not adversarial." Matter of S-M-J-, 21 I. & N. Dec. 722, 724 (BIA 1997). As such, the BIA had an obligation to ensure that Mr. Djokovic received a fair hearing. If it did not provide him with a copy of the decision being reviewed, it failed to perform its duty.

The BIA may have been unaware that the decision provided to the parties differed in material respects from the decision that it may have been reviewing, as its failure to address this suggests. The Sixth Circuit assumed that it would not have mattered which decision the BIA reviewed but, again, the court exceeded the scope of its authority as an appellate court in making that determination. Instead, the court should have remanded to the BIA to allow it to determine, in the first instance, whether it violated its own regulations and procedures and how to remedy the situation. Gonzalez, 126 S. Ct. at 1615; Ventura, 537 U.S. at 16-17.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

The court should have considered whether there is a reasonable possibility that Petitioner would suffer other serious harm upon removal to his native country or remanded to allow the agency to make that determination.

The BIA deprived Petitioner of due process by providing him with a decision from the IJ that differed in material respects from the decision that it reviewed. The court should have remanded to allow the agency to address this issue.

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals and the BIA.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
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APPENDIX

6TH CIRCUIT:

Opinion,
filed 04/14/08 ..... A1 - A23

BOARD OF IMMIGRATION APPEALS:

Decision of the Board of
Immigration Appeals,
filed 03/29/07 ..... B1 - B4

Oral Decision of the
Immigration Judge,
filed 08/30/05 ..... C1 - C40

NOT RECOMMENDED
FOR FULL-TEXT PUBLICATION
No. 07-3499
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FLAMOR DJOKOVIC,
Petitioner,
v.

MICHAEL B. MUKASEY,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR, District Judge*

BOGGS, Chief Judge. Flamor Djokovic was a citizen of the former Federal Republic of Yugoslavia[1]

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*The Honorable Milton I. Shadur, United States District Judge of the Northern District of Illinois, sitting by designation.

[1]Djokovic was born in Tuzi, Montenegro, which at the time of his birth was part of the Federal Republic of

when he entered the United States without inspection and thereafter requested asylum and withholding of removal from the Immigration and Nationalization Service ("INS").[2] The INS referred his application to the Immigration Court, where it was reviewed and denied by Immigration Judge ("IJ") Marsha K. Nettles: The IJ ordered him to be removed to Serbia and Montenegro. Djokovic appealed to the Board of Immigration Appeals ("BIA"), which adopted and affirmed the IJ's decision. Djokovic now petitions this court for review, arguing that: (1) he was denied

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Yugoslavia. In 2003, Yugoslavia was formally abolished and Montenegro became part of an entity called "Serbia and Montenegro." On June 3, 2006, this entity was also formally abolished when Montenegro declared its independence. Serbia and Montenegro are now two independent countries.

[2]In 2002, the INS was abolished by the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), and its functions were transferred to various agencies within the Department of Homeland Security ("DHS"). The Immigration Court and the Board of immigration Appeals remain part of the Department of Justice. We refer to INS when discussing actions it took during its existence and to DHS for activities after the INS's abolition.

due process when he was given only an uncorrected, unsigned version of the IJ's decision prior to the BIA proceedings instead of the corrected copy that was included in the BIA's administrative record when Djokovic petitioned this court for review; and (2) the underlying decisions of the IJ and BIA were erroneous.

We hold that though it was extremely poor practice not to provide the parties with the corrected version of the IJ' s decisi<?n when it was corrected, Djokovic' s right to due process was not violated because the discrepancies between the versions were neither significant nor central to the BIA's affirmance of the IJ's judgment.

We also affirm the BIA's denial of Djokovic's claims for asylum, withholding of removal; and protection under the Convention Against Torture ("CAT"). Though we do not endorse the IJ's findings regarding Djokovic' s credibility and whether his experiences amounted to past persecution, we affirm the IJ and BIA on the grounds of changed country conditions.

I

Djokovic is an ethnic Albanian who was born on January 2, 1985, in Tuzi, Montenegro. He first

entered the United States on September 9, 1999, at the age of fourteen. On March 8, 2000, Djokovic submitted his first Application for Asylum and Withholding of Removal ("initial application") under the hnmigration and 'Nationality Act ("the Act"), 8 U .S.C. § 1101. At the time, Djokovic was not fluent in English and relied on an interpreter provided by a community organization-the Albanian Assistance Center in Bronx, New York.

After various procedural hearings, including a change of venue from New York to Detroit, and the passage of several years, an IJ conducted a hearing on August 30, 2005, to investigate the merits of Djovokic's asylum application; Djovokic was represented by counsel and the proceedings were conducted in English, Djokovic having learned the language in the six years since his arrival in America. Prior to the hearing, Djokovic had submitted a supplemental or updated application for asylum and withholding under both the Asylum Act and the CAT. In addition to the initial and supplemental applications, Djokovic also entered several documents into evidence, including a

certificate from the Kosova[3] Liberation Army ("KLA") stating that Djovokic's father had been actively involved in "support to Kosova Refugees." Several articles and reports on the background of Yugoslavia, Serbia, and Montenegro were also admitted.

Because we narrowly affirm the IJ and BIA decisions on the grounds of changed country conditions, we describe the crux of Djokovic's claim only in brief. Djokovic claims that he and his family have been persecuted for their political and social activities, specifically for assisting ethnic Albanians in Montenegro and providing safe passage to Albania for refugees from Kosova. Djokovic also suggested that his father was involved in supplying arms to the KLA, but he was not certain of that.

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[3]Most English-language sources spell the country "Kosovo", which is also the Serbian spelling. The Albanian spelling is "Kosova" or occasionally "Kosove". A rose by any other name might smell as sweet, but a country by any other name is a highly political issue. Given the country's recent declaration of independence, we find it more appropriate to adopt the spelling preferred by the government of the new country. Accordingly we use "Kosova" unless quoting from another source.

The event that precipitated Djovokic's flight from Montenegro occurred on the evening of June 6, 1999. According to Djokovic, he was at his uncle's house watching a soccer match. Djokovic's father had been away from their home for an unspecified amount of time, helping families from Kosova get into Albania. Djokovic claims that late in the evening, a group of armed men wearing military clothing broke down the door of the uncle's house and arrested and beat both Djokovic and his uncle. They demanded to know the whereabouts of Djokovic' s father, and when neither Djokovic or his uncle provided any information, the two were taken to a military prison. During the ride, the armed men alternately taunted and beat Djokovic and his uncle, mocking the situation of ethnic Albanians. At the military prison, Djokovic and his uncle were separated and placed in small, windowless, lightless cells. Djokovi~ was left alone for several hours. Eventually three men came into the cell, interrogated him, and beat him with their hands, feet, and police batons. Djokovic was left alone again for several hours before being released. Though he was not beaten again, the guards insinuated that something worse would happen if Djokovic's father did not turn himself in. After the June 6, 1999 incident, Djokovic did not leave the

house, not even to attend school. Four to six weeks later, Djokovic's family decided to smuggle him out of the country because they feared for his safety. He was smuggled into Albania where he stayed for a few months awaiting an opportunity to come to the United States. A family friend found a youth soccer team that was traveling to Canada and was willing to pass Djokovic off as one of their players. In Canada, Djokovic met a separate set of smugglers who got him into the United States.

Djokovic testified to these facts at the hearing. While he demonstrated fluency in English, it is also clear that he did not have a full mastery of the language.and that he misunderstood the judge and DHS attorney at times and the judge and attorney also seemed to have misunderstood him. At the conclusion of the hearing, the IJ recessed for deliberations, though the record does not indicate the length of the recess. Upon reconvening, the IJ rendered an oral decision denying Djokovic's application and ordering him removed to Serbia-Montenegro. The IJ found that Djovokic was not credible and, in the alternative, that even if Djovokic were credible, the events that he described did not rise to the level of persecution. The IJ further found that even if such treatment were persecution, the

country conditions have changed-in Serbia-Montenegro, rebutting Djokovic's presumption of a well-founded fear of future persecution. Finally, the IJ found that Djokovic' s past treatment did not rise to the level of severity that would justify granting asylum on humanitarian grounds. As a corollary, because pjokovic could not meet the burden for a grant of asylum, he also failed to meet the higher burden necessary for a grant of withholding.

As for Djovokic's claim for protection under the CAT, though the IJ made an independent assessment of Djovokic's credibility oil this issue, she ultimately relied on many of the same inconsistencies discussed below in the context of Djovokic's asylum claim. The IJ fuitherfound that even ifDjokovic had been credible, the conduct complained of did not rise to the level of torture as defined in the CAT. Other than Djokovic's allegation of past torture, he presented no other substantial evidence to prove that he faced the possibility of torture should he be removed. Accordingly, the IJ denied Djokovic's application for withholding under the CAT and ordered him removed to Serbia-Montenegro.

The IJ initially rendered an oral decision. The uncorrected and unsigned transcription was included in the administrative record at pages 85-117. Later,

though it is not clear when, the II made handwritten changes to the decision and signed it. This version was incorporated into the administrative record at pages 50-82.

Djokovic appealed the decision. The BIA affirmed the IJ's decision on March 29, 2007 ill a one-paragraph opinion that summarily adopted the [mdings and reasoning of the II. *In re Djokovic*, No. A 78 205 845 (B.I.A. March 29, 2007). The BIA did not state which version of the IJ' s decision it reviewed. Following the BIA's decision, Djokovic appealed to this court. It was only upon receiving the record for this appeal that Djokovic discovered the two versions of the judgment.

II

"To prevail ona due process challenge to deportation proceedings, [an alien] must show error and substantial prejudice. A showing of prejudice is essentially a demonstration that the alleged violation affected the outcome of the proceedings; we will not simply presume prejudice." *Gishta v. Gonzales*, 404 F.3d 972, 979 (6th Cir. 2005) (quotation omitted). "The alien carries the burden of establishing that [he was] prejudiced ... or denied ... fundamental fairness in order to prove that he has suffered a denial of due

process." *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005).

Djokovic concedes that "some of the changes are undoubtably grammatical or minor in nature," but argues that there are also, "many significant changes." Pet'r Br. at 15. Djokovic explicitly mentions four differences that he considers significant. The first difference involved the omission ofthe word "not" in the definition oftorture, which reversed the meaning of the sentence. *Compare J.A. 66 with* J.A. 31. Nevertheless, it was obvious that "not" was omitted accidentally, and the intended meaning of the sentencing was clear given the context and the supporting citation. The second difference involved the substitution of the word "admissions" for "omissions" in a sentence explaining what facts can support an adverse credibility fmding. *Compare* J.A. 31-32 *with* J.A. 6869. While "admit" and "omit" obviously have different meanings, the substitution made little difference in practice given the surrounding context and given the accompanying citation, which referenced the language contained in the corrected copy.

The third and fourth differences are more troubling and illustrate the dangers in an oral opinion that is forwarded for review without an

examination for errors in transcription: Both of these discrepancies arose because the IJ initially misquoted Djokovic' s testimony and later corrected those quotes. In the flrst instance, the IJ misquoted Djokovic's testimony concerning the dates of his father's arrests. *Compare* J.A. 43 *with* J.A. 78. In the second instance, the IJ misquoted Djokovic's testimony in response to the question of whether he or his family had been involved in political organizations. *Compare* 1.A. 36 *with* J.A. 71.

If the IJ had actually relied on the inaccurate quotations in making her adverse credibility flndings, this court would be very troubled. However, "that does not seem to be the case. The IJ's discus~ion of the alleged inconsistency as to the dates of the father's arrest took up the three pages of the transcribed opinion and the IJ accurately quoted Djokovic's testimony twice in those pages, whereas she mIsquoted it only once. The IJ's discussion of the alleged inconsistency" as to participation in political groups took up two pages. Despite the misquotation, one could easily glean the factual basis of and reasoning behind the IJ's adverse" credibility finding on that matter. Of course, whether or not the IJ was actually correct in identifying inconsistencies and whether her reasoning was sound is a separate

issue-but not one that matters for Djokovic's due process claims.

We recognize that "[i]n general, it is a bad practice for a judge to continue working on his opinion after the case has entered the appellate process, except in emergency situations requiring the issuance of the judgment in advance of the preparation of the opinion. The practice presents the losing party with a moving target." *Mamedov v. Ashcroft*, 387 F.3d 918, 920 (7th Cir. 2004). However, Djokovic has failed to explain how he was *prejudiced* by not having the corrected judgment.

On one hand, if the BIA relied on the uncorrected decision, which admittedly contained errors, Djokovic was not prejudiced because he had the opportunity to point out any mistakes to the BIA. On the other hand, if the BIA relied on the corrected version of the judgment, it is also hard to see how Djokovic was unfairly prejudiced by not receiving a copy. After all, Djokovic's brief to the BIA questioned only the underlying reasoning of the IJ and did not refer to any of the particular mistakes it now identifies in the uncorrected copy of the judgment. Obviously, if the changes to the judgment had been substantive-for example if the IJ added alternative grounds for her adverse credibility finding-then

Djokovic would have cause for complaint. But that is not the case here. The corrected copy contained cosmetic changes fixing errors that Djokovic apparently did not deem significant enough to mention in his briefto the BIA. Though this court deplores an administrative process that failed to provide the parties with corrected copies of the IJ's decision, it is clear that the outcome of the case (the BIA' s affirmance of the IJ) would have been no different. Thus, Djokovic' s due process claim is without merit.

III

Where the BIA adopts an IJ's decision, we review the underlying decision as well as any additional reasons stated QY the BIA. *Gilaj v. Gonzalez*, 408 F.3d 275, 282-83 (6th Cir. 2005). We review the legal conclusions of the IJ and BIA de novo. *Ali v. Ashcroft*, 366 F.3d 407,409 (6th Cir. 2004). Findings of fact, including determinations of credibility, however, are deemed "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA § 242(b)(4)(B), 8 D.S.C. § 1252(b)(4)(B).

A. Refugee Asylum and Withholding of Removal

1. Eligibility

In order t,o be eligible for asylUin, the applicant must demonstrate that: (1) he is a refugee as defined in 8 D.S.C. § 1101(a)(42)(A); and (2) he "merits a favorable exercise of discretion by the Attorney General." *Perkovic v. INS*, 33 F.3d 615, 620 (6th Cir. 1994). The applicant bears the burden of proof of demonstrating either past persecution or well-founded fear of future persecution. 8 C.F.R..§ 208.13(a)-(b) (1997).

An applicant's testimony, if credible, can be, by itself, "sufficient to sustain the burc}en of proof without corroboration." 8 C.F.R. § 208.13(a) (1997). An applicant who establishes past persecution is presumed to have a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(1)(i) (1997). The presumption may be rebutted by establishing by a preponderance of the evidence that since the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted ifhe were to return. *Ibid.*

2. Credibility and Past Persecution

Because we affirm the IJ's decision on the narrow grounds of changed country conditions, we need not formally review her adverse credibility finding or her finding that the alleged events did not arise to. the level of persecution.

3. Changed country conditions—

Whether country conditions have changed sufficiently to rebut the presumption of a well founded fear is a finding of fact, which we review under the deferential abuse-of-discretion and substantial-evidence standards. An IJ' s finding of changed country conditions is deemed "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA § 242(b)(4)(B), 8U.S.C. § 1252(b)(4)(B).

As evidence of changed country conditions, DHS submitted. the 1999, 2003, and 2004 Country Reports on Human Rights Practices in Serbia and Montenegro. Eight pages of the 1999 report detailed the conditions in Montenegro. There were some reports of abuses committed by the federal V J (Yugoslavian Army) troops stationed in Montenegro, including abductions and detentions of Kosovar refugees and extrajudicial killings. U.S. Dep't of

State, Country Reports on Human Rights Practices for Serbia-Montenegro- 1999, 35-36 (Feb. 23, 2000) [hereinafter 1999 Report]. The 2003 and 2004 reports, however, demonstrated significant improvements in the conditions. U.S. Dep't of State, Country Reports on Human Rights Practices for Serbia-Montenegro-2003 (Feb. 25, 2004) [hereinafte 2003 Report];U.S. Dep't of State, Country Reports on Human Rights Practices for Serbia-Montenegro-2004 (Feb. 28,2005) [hereinafter 2004 Report). For example there were no reports of politically motivated killings or disappearances in 2003 or 2004. 2003 Report, 41 and 2004 Report, 34. The 2003 and 2004 reports also noted that while there were still reports of police occasionally beating suspects during arrest or detention, there were fewer reports than in previous years. 2003 Report at 41 and 2004 Report at 34. The sections on "National/Racial/ Ethnic Minorities" did not even mention the Albanian minority, but rather focused the problems encountered by Romanis and Bosniaks.[4] 2003 Report at 48 and 2004 Report at 40-41.

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[4]"Bosnian" refers to citizens of Bosnia, regardless of ethnicity. "Bosniak," however, is an ethnicity.

The IJ noted the changed country conditions, citing the lack of politically motivated killings, disappearances, or detentions. J.A. 82. The IJ also noted that many of the events that happened to Djokovic and his family occurred under Slobodan Milosevic's regime and that Milosevic was no longer in power. Though the IJ based her finding primarily on the country reports, this does not mean her decision was not supported by substantial evidence. *Shasha v. Gonzales*, 227 F. App'x 436,440 (6th Cir. 2007) ("This Court has consistently held that substantial evidence supports the conclusion that country reports detailing the regime change in Iraq rebut any presumption of a well-founded fear of persecution based on past persecution on account of Christianity."); *see also Gojani v. Mukasey*, No .. 06-3951, 2008 U.S. App. LEXIS 4229, *10 (6th Cir. Feb. 20,. 2008) (upholding a fmding of changed country conditions even. though the IJ "relied principally on the State Department's Country Reports regarding the human rights situation in Kosovo."). The IJ's findings also comported with past precedent. *See, e.g., Micakovic v. Ashcroft*, 85 F. App'x 424, 425-426 (6th Cir. 2003) ("The IJ noted that, according to the State Department Country Report, ethnic Albanians were treated well in Montenegro,

and concluded that [the applicant] should not fear returning there."); *Gjokic v. Ashcroft*, 104 F. App'x 501, 506 (6th Cir. 2004) ("According to the State Department, ethnic Albanians are treated relatively well in Montenegro, and the evidence thus does not compel an immigration judge to conclude that petitioners have a well-founded fear of returning there.").

Djokovic responded by citing several articles discussing the conditions in Serbia and Montenegro. But these articles did not adequately distinguish conditions in Serbia and conditions in Montenegro, the former being much worse for ethnic Albanians. Furthermore, much of the criticism contained in the reports was directed at the lack of investigation into past abuses, as opposed to new allegations of recent abuses. The Amnesty International Report acknowledged the same: "There appeared to be a drop in the number of alleged instances oftorture or ill-treatment by the police in 2004. Amnesty International is concerned, however, that allegations continued and investigations into previous allegations of police torture ai.1d ill-treatment remained seriously flawed." Amnesty International, "Serbia and Montenegro: A Wasted Year. The Continuing Failure to Fulfill Key HUman Rights

Commitments Made to the Council of Europe," (March 22, 2005), available at http://www.amnesty.org/en/library. Furthermore, Djokovic did not submit any individualized evidence that would tend to show that he would remain a target for persecution despite these changed country conditions. The immigration judge's finding that Djokovic did not have a well-founded fear of persecution based on the changed country conditions in Montenegro was thus supported by substantial evidence.

4. Withholding of Removal

In order to qualify for withholding of removal, Djokovic "must establish that there is a clear probability that he will be subject to persecution if forced to return to the country of removal." *Pilica v. Ashcroft*, 388 F.3d 941,951 (6th Cir. 2004). This is a higher burden of proof than what is required for a claim of asylum. Because Djokovic could not establish his eligibility for asylum, it follows he could not "satisfy the more onerous burden for withholding of removal either." *Cutaj v. Gonzales*, 206 F. App'x 485, 492 (6th Cir. 2006).

B. Asylum on humanitarian grounds

Djokovic also applied for a humanitarian grant of asylum under 8 C.F.R. § 1208.13(b)(1)(iii). That provision applies to those applicants who have suffered past persecution, but whose presumption of a well-founded fear of persecution has been rebutted. In orde.r to qualify, the applicant must either demonstrate "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or "establish that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 208.13(b)(I)(iii)(A) and (B).

The IJ found that Djokovic was not eligible for a grant of asylum under this portion of the regulations because Djokovic suffered only "one detention of a brief confinement and an alleged beating that occurred during that brief confinement.". The IJ also relied on *In re N-M-A*, 22 I&N Dec. 312 (BIA 1998), a case in which the BIA denied asylum to ail applicant who was detained for a month, during-which he was beaten periodically, deprived of food for three days, and ultimately hospitalized. The IJ emphasized that "the incidents [in Djokovic's case] nowhere rise to the level of the incidents that were se forth *in Matter of ——A*." *In re Djokovic*, File A 78 205

845, slip op. at 30 (U.S. Immigration Court, Aug. 30, 2005)(uncorrected decision).

Even taking into account Djokovic's young age, we cannot hold that the IJ abused her discretion in denying Djokovic's request for asylum on humanitarian grounds. Those seeking humanitarian asylum must have suffered past persecution that is "particularly severe." Cutaj,206 F. App'x at 491 (citing *Pergega-Gjonaj v. Gonzales*, 128 F. App'x 507, 512 (6th Cir. 2005)). We have, in numerous cases, rejected applications for asylum on. humanitarian grounds when the maltreatment complained of is far more severe than that suffered by Djokovic. *See, e.g., Pergega-Gjonaj* (four months of hard labor and starvation and atrocities committed against extended family members); *Potka v. Ashcroft*, 65 F. App'x 50, 51 (6th Cir. 2003) (applicant was forced to watch murdered mother's body being dragged through the streets). Assuming Djokovic's account of events to be true, the IJ did not abuse her discretion in holding that his experiences did not constitute particularly severe persecution and that Djokovic was accordingly ineligible for a humanitarian grant of asylum.

C. Protection under the CAT

To be eligible for relief under the CAT, "an applicant must show that it is more likely than not that she will be tortured upon return to her country." *Hamida v. Gonzales*, 478 F.3d 734, 741 (6th Cir. 2007) (citing 8 C.F.R. § 208. 16(c)(2)). "Torture is an extreme form ofcmel and inhuman treatment and does not include lesser forms of cmel~ inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 1208.18(a)(2). Evidence of past torture inflicted upon the applicant is one of the factors used to evaluation whether it is more likely than not that an applicant would be tortured upon removal. The IJ rejected Djokovic's request for protection under the CAT on the grounds that: (1) Djokovic's statements concerning the alleged torture were not credible; and (2) even if they were, "the single incident of brief confmement and beating" did not rise to the level of torture as defined in the CAT. As we have already noted, the IJ's credibility assessment was flawed. Nevertheless; we affirm the IJ's conclusion. Even if Djokovic's testimony is taken as credible, the incident complained of did not constitute past torture and Djokovic introduced no other significant evidence to establish that it was more likely than not that he would be tortured if

removed. The D's finding is supported by substantial evidence and we accordingly affirm.

U.S. Department of Justice
Executive Office of Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Hyman, Marshal E. Esquire
3250 West Big Beaver, Suite 529
Troy, MI 48084-2902

Office of the District Counsel/DET
333 Mt. Elliott St., Rm 204
Detroit, MI 48207

Name: DJOKOVIC, FLAMOR A78-205-845

Date of this notice: 03/29/07

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure
Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A78 205 845 - Detroit Date: Mar 29, 2007

In re: FLAMOR DJOKOVIC

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Marshall E. Hyman, Esquire

ON BEHALF OF DHS:
Thomas O. Martin
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge, as the respondent has failed to demonstrate clear error with the Immigration Judge's adverse credibility finding. *See Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a

statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). No sufficient explanation has been provided concerning the respondent's inconsistent statements as to whether he belonged to an organization, even though the respondent indicated that he and his family members belonged to "pro-Albanian groups" in their city. *See* Exh. 3, part B, item 3A. No persuasive argument has been put forth concerning the respondent's discrepant accounts of his father's alleged arrest(s), particularly concerning whether his father was ever apprehended prior to the respondents departure. *See* I.J. at 2325. While we agree with the respondent that his manner of entry into the United States would not be, by itself: an adequate basis to fault his credibility, this inconsistent account weighs against him when considered with all the other discrepancies, especially since it relates to how he supposedly fled. The details of the one detention which respondent alleged raise concerns, as the Immigration Judge indicated, as to whether it took place and what purported abuse took place there. The Immigration Judge already considered the fact that the respondent was recounting events from a younger age, but we observe

that the respondent had the opportunity, as an adult, to testify and correct his written application. The respondent has offered little substantive challenge on appeal with the Immigration Judge's finding that the one brief detention and essentially minor physical abuse, even if it took place, would have risen to the level of persecution (I.J. at 27-28). The respondent has also not sufficiently countered the Immigration Judge's finding that conditions have changed in Serbia-Montenegro[1] (I.J. at 28-30). We also agree with the Immigration Judge's analysis denying protection under the Convention Against Torture. Accordingly, the appeal is dismissed.

FOR THE BOARD

[1] We recognize that Serbia and Montenegro formally split from each other in 2006.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
Detroit, Michigan

File A 78 205 845 August 30, 2005

In the Matter of

FLAMOR DJOKOVIC,	)	
Respondent	)	IN REMOVAL
	)	PROCEEDINGS

CHARGE: Section 212 (a) (6) (A) (I) of the Immigration and Nationality Act, as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than designated by the attorney general.

APPLICATION: Asylum under Section 208(a) of the Immigration and Nationality Act: withholding of removal under Section 241 (b) (3) of the Immigration and Nationality Act; and withholding pursuant to

Article III of the Convention Against Torture.

ON BEHALF OF RESPONDENT:
Marshal E. Hyman, Esquire
3250 W. Big Beaver Road,
Suite 529
Detroit, Michigan 48084

ON BEHALF OF DHS:
Thomas O. Martin, Esquire 529
Assistant Chief Counsel
333 Mt. Elliott
Detroit, Michigan 48207

DECISION OF THE IMMIGRATION JUDGE

Procedural History

Respondent is a single adult male, native of Yugoslavia and citizen of Serbia-Montenegro. The Immigration and Naturalization Service, (operating now as the Department of Homeland Security, hereinafter referred to as "the Government,") initiated removal proceedings against the respondent pursuant to authority contained in Section 240 of the Immigration and Nationality Act (hereinafter referred to as "the Act"). Proceedings were commenced with this Court by the filing of the Notice to Appear dated April 19, 2000.

At a prior hearing held before the Court, respondent, through counsel, admitted all four factual allegations in the Notice to Appear and conceded the sole charge of removability. Based upon respondent's admissions and concessions, this Court finds that respondent's removability has been established by the requisite clear and convincing evidence.

The respondent declined to designate a country to which removal would be directed and Serbia-Montenegro was directed. Respondent requested the opportunity to renew his administrative re-filed application for asylum under Section 208(a) of the Act. An application for asylum under Section 208(a) of the Act, is also considered an application for withholding of removal under Section 241(b) (3) of the Act. Alternatively, respondent requested that this Court consider his application to be one seeking protection under Article III of the Convention Against Torture (hereinafter referred as "the Torture Convention"). At the conclusion of the merits hearing, respondent did not have the requisite 1-year physical presence required to be statutorily eligible for the relief of voluntary departure and respondent, through this counsel, conceded this point.

Evidence Presented and Summary of Respondent's Claim

In addition to the Notice to Appear admitted into the record as Exhibit 1, several other documents were offered and admitted into the record. Admitted into the record as Exhibit 2 was respondent's administratively filed application for asylum and both forms of withholding. Attached to that administratively filed application and included as part of Exhibit 2, is a two page statement, dated February 8, 2000.

Admitted into the record as Exhibit 3 in these proceedings was an updated or supplemental application for asylum filed by the respondent, through his current counsel, and attached to that updated or supplemental application, was a written statement in support of the respondent's claims for relief from protection (that was approximately four pages in length.)

Admitted into the record as Exhibit 4 was a series of documents prepared by the respondent containing tabs A-Z and tabs AA-EE. Tabs A, B, C, D consisted of a photocopy page of the respondent's passport, a copy of the respondent's alleged birth certificate from the former federal republic of Yugoslavia with and English translation, a copy of

what purports to be the respondent's driver's license from the former federal republic of Yugoslavia (Serbia-Montenegro) with and English translation, and a copy of a document that purports to be a certificate from the Kosova Liberation Army verifying or confirming the involvement of respondent's father in the support of Albanian refugees in Kosovo.

Also admitted as part of Exhibit 4, at tabs D-Z and tabs AA-EE were a series of articles and reports regarding country conditions in the former federal republic of Yugoslavia (now Serbia-Montenegro) and the Balkan states. Admitted into the record as Exhibit 5 and 6 were the Government's exhibit lists containing tabs A and B (entered into the record as Exhibit 5) and tab C (entered into the record as Exhibit 6). Exhibits 5 and 6 consisted of the U.S. Department of State Country Reports and Human Rights Practices for Serbia-Montenegro for the years 1999, 2003, and 2004. Finally, admitted into the record as Exhibit 7 is the respondent's supplemental exhibit list containing tabs FF-NN. Tabs FF-NN admitted into the record as Exhibit 7 consisted of various articles and reports regarding the background of country conditions of what is now Serbia-Montenegro and the surrounding Balkan states.

The Court notes that this was the documentary evidence submitted in this case. Prior to submitting the respondent's supplemental application into the record is Exhibit 3 (including the respondent's four page statement), this Court ascertained whether the respondent had any amendments, changes, or corrections to the application. Both respondent and his counsel indicated that there were no changes or corrections that he wished to make. Respondent also indicated to this Court that he was fluent in the English language and wished to proceed forward in English. Respondent's counsel indicated to this Court the same information. In addition, prior to admitting the application or the supplemental or amended updated application to the record as Exhibit 3, this Court provided respondent with the requisite consequences of knowingly filing a frivolous asylum application and a notice of privilege of counsel (this was also provided to respondent in writing and the written consequences are contained in the record). Thereafter, this Court swore respondent to the truth of the contents of the updated/supplemental application and that application was then admitted into the record as Exhibit 3.

In addition to the documentary evidence submitted by respondent, respondent offered his own testimony in support of his claims for relief and protection. Respondent was the only witness to testify before this Court. Based upon respondent's testimony and the documentary evidence of record, including his written applications for relief and protection, respondent's claim can best be summarized as follows:

Respondent indicates that he departed the former federal republic of Yugoslavia (what is now Serbia-Montenegro) when he was approximately 14-years-old. The events precipitating and/or causing the respondent's departure from Serbia-Montenegro were events surrounding his alleged mistreatment or harassment at hands of the Serbian police or military. This alleged mistreatment or harassment that the respondent claims that he suffered was due to the respondent, the activities of the respondent's father and the assistance the respondent's father provided to individuals of Albanian ethnicity. In particular, respondent testified that his father provided money and food and various other supplies and assisted individuals of Albanian decent in the Kosovo region as well as in other parts of Serbia Montenegro. Indeed, according to the respondent's

testimony, his father frequently traveled between Kosovo and the Serbia-Montenegro area where he grew up in (in the city Tuzi) during the father's activities and the assistance of ethnic Albanians. Indeed, respondent testified that his father was in opposition to the Serbian controlled government at the time that the respondent purportedly left Albania in 1999. Indeed, the respondent testified that his father was active in helping ethnic Albanians, specifically in the years 1998 and 1999.

Respondent testified that the event that triggered his departure to the United States occurred on June 6, 1999, when Serb military troops came to the respondent's uncle's house looking for the respondent's father. Respondent testified that he was at his uncle's house as he was watching a soccer game on television and as he was also inquiring of his uncle (his father's brother) as to the well being of his father. Respondent testified at the time that he was at the uncle's house on June 6, 1999, that he and he and his mother were aware that his father was currently in Kosovo assisting ethnic Albanians.

Respondent testified that on June 6, 1999, the Serbian military troops came into the uncle's house and proceeded to arrest and beat the uncle. Respondent attempted to escape through a window.

However, respondent indicated that he was caught in a hallway and that he was also beaten. Respondent testified that he and his uncle (that he identified by the name of "John") were taken to a military camp that respondent described as a prison.

Respondent specifically testified that while he and his uncle were being transported to this military camp/prison, that the uncle was elbowed in the stomach and that he and the uncle were harassed and questioned regarding his father's whereabouts and regarding the assistance that the respondent's family was providing to ethnic Albanians.

Respondent testified that upon arrival at this military camp/prison, that he and his uncle were put in separate rooms. Respondent testified that he was put in a room that was dark. He was held there for approximately one and a half to two hours when two men came into the dark room and sat respondent down in a chair. A third man then entered the room. Respondent testified that he never saw this third man's face, but heard the third man's voice who was the individual predominantly talking or speaking during this time. This third individual asked the respondent whether he was the son of the individual the respondent identified as his father. Respondent testified that this third man specifically asked

respondent whether he was the son of and used the respondent's father's specific name "Lougjid Djokovic." Respondent testified that this third man also asked respondent whether he knew the whereabouts of his father and respondent said that he did not. Respondent testified that he was repeatedly asked as to the whereabouts of his father and he never told the individuals where his father was at. Respondent testified that upon his failure to identify the whereabouts of his father, the third man, told the other two men to "make respondent come to his conscious or his senses". Thereafter, the third man departed the room and the two other remaining men beat the respondent. Respondent testified that he was hit twice with a stick, punched in the stomach, kicked in the stomach and back. Respondent testified that he was on the floor where he estimates that he remained for 4 to 5 hours. After approximately 4 to 5 hours, respondent indicated the two men came into the dark room and indicated that he was free to go. They, at that point, also indicated to the respondent to inform or notify his father to report to this military camp that it was better for the father to turn himself in as opposed to "them" catching the father. Upon his release, respondent indicated that he was really not aware of his

surroundings and he just began walking and while walking, apparently a neighbor noticed the respondent and took the respondent home where respondent testified that his grandmother saw his condition; which respondent described as bruised ribs. Subsequently, the respondent's mother returned to the home. Respondent then testified that he did not leave the house after this incident and did not even go to school. Respondent testified that his family did not take him to a doctor or hospital because their were scared that maybe another incident would happen or perhaps his mother would be taken into custody of some sort.

Respondent indicated that he remained at the house for approximately anywhere from 3 to 5 to 6 weeks and at times, he went to his uncle's house which was in close proximity to his family's home. Respondent specifically testified on direct examination that he left Serbia-Montenegro for Albania approximately 5 to 6 weeks after the June 6, 1999 incident. Respondent testified that his father assisted him and by taking him to the border of Albania. In particular, the respondent's father and a friend of the respondent's father assisted the respondent and his father in going approximately 100 yards away from the border between

Serbia-Montenegro and Albania. Respondent's father then escorted the respondent through the mountains into Albania to an awaiting friend of the father's that respondent identified as "Sokol". The respondent testified that he stayed. with Sokol for approximately one month and that he attempted to try to come to the United States twice. However, a third attempt was made and respondent was successful in going to at least Canada. This third attempt resulted from this individual identified as Sokol finding a soccer team in Albania that was traveling to Canada. Respondent was part of this alleged soccer team and traveled to Canada. Subsequently, respondent testified on multiple occasions that he then traveled from Canada alone in a semi-truck sometime in September 1999 to the United States. He testified that he remained in the semi-truck after crossing the border into the United States for approximately 30 minutes and that there was a car that was trailing this truck that contained three other individuals (smugglers) who was assisting the respondent in his travels to the United States. Respondent got into this car which then took the respondent to one of his fatherls friends who lived in New York. The respondent testified that he had made arrangements

with these individuals to insure his passage all the way to New York.

Respondent also testified that while in what is now Serbia-Montenegro, that he was unable to learn his Albanian history and language. He was taught his Albanian and history language by his grandmother who would often tell respondent and other youngsters about the Albanian language and history.

STATEMENT OF THE LAW

Asylum and Withholding of Removal Under the Act

An applicant for asylum or withholding of removal under Section 241(b) (3) of the Act bears the evidentiary burdens to proof and persuasion. See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified under the grounds by Matter of Mogoharrabi, 19 I&N Dec. 439 (BIA 1987).

An applicant for asylum must demonstrate that he or she is a refugee within the meaning of Section 101(a) (42) of the Act. This requires that the respondent in this case establish that he is unwilling or unable to return to his country of nationality or last habitual residence because of: (I) past persecution, coupled with either a showing of a

likelihood of present or future persecution; (ii) a well-founded fear of future persecution; or (iii) compelling (humanitarian) reasons arising out of the severity of the past persecution or reasonable possibility of suffering other serious harm, on account of the respondent's race, religion, nationality, membership in a particular social group, or political opinion. See B C.F.R. Section 1208.13(b) (1).

This requires that the respondent demonstrate that his fears are both subjectively genuine and objectively reasonable through credible, direct; or specific evidence which demonstrates that he possesses a belief or characteristic which a persecutor seeks to overcome either by means of punishment of some sort, the persecutor is aware or could become aware that the respondent possesses this belief or characteristic, the persecutor has the capability of punishing the respondent, the persecutor has the inclination to do so. See 8 C.F.R. Section 1208.13(a); Matter of Mogharrabi, supra.

An applicant for withholding of removal under Section 241(b) (3) of the Act must demonstrate a clear probability that his or her life would be threatened in the country directed for removal on account of one or more statutorily protected grounds set forth of law. See INS v. Stevic, 467 U.S. 407 (1984). The Supreme

Court in Stevic held that the clear probability standard requires a showing that it is more likely than not that the applicant would be persecuted on account of one of the more statutorily protected grounds.

The Supreme Court in INS v. Cardoza-Fonsecca, 480 U.S. 421 (1987), found and held that the terms well-founded fear and clear probability are significantly different and therefore the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal under Section 241 (b) (3).

Withholding Under the Torture Convention

In the instant case, the respondent has also requested that this Court consider his application to be one seeking protection under the Torture Convention. An applicant for withholding of removal under the Torture Convention bears the burden of demonstrating that it is more likely than not he or she would be tortured if removed to the proposed country of removal. See 8 C. F.R. Section 1208.16(c) (2) and Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000).

For an act to constitute "torture" respondent must satisfy each of the five elements in the definition of torture found in the regulations. See 8

C.F.R. Decision 1208.18(a). The act must cause severe physical or mental pain or suffering. The act must be intentionally inflicted. In order constitute torture, mental pain or suffering must be prolonged. See Section 8 C.F.R. Section 1208.18(a) (4). The act again must be intentionally inflicted and must be inflicted for a proscribed purpose defined in the regulations. The act must be inflicted by or at the instigation of a public official or with the consent on acquiescence of such official who has custody or physical control of the victim. Finally, the act must not arise for the imposition of lawful sanctions. Matter of J-E-, 23 I&N Dec. 219 (BIA 2000).

The term "the activity constituting torture" does not simply refer to general violence. Rather, the roughest activity must be the very torture that the applicant claims to fear. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a particular country, there does not constitute a sufficient basis alone for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. See Castellano-Chacon v. INS, 341 F.3d 533 (6th Circuit 2003).

ANALYSIS

Asylum and withholding of removal under the Act

Before determining whether an applicant meets a statutory criteria required for asylum as well as withholding under the Act, this Court must make a threshold determination of the alien's credibility. See Matter of O-D-, 20 I&N Dec. 279 (BIA 1998). The credibility of a respondent is of extreme importance in assessing his or her claims for relief and protection. Indeed, this Court is given the primary responsibility for judging the credibility of the witnesses that appear before it. Credibility is also a critical factor in determining whether a valid claim of persecution has been established. See Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) . Sometimes the respondent may offer his or her testimony as the only evidence to support of the claim for relief, as such can suffice whether their testimony is believable, consistent and sufficiently detailed, a lot of general conditions in the home country, to provide a plausible and coherent account of the basis for the alleged fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1999). Nevertheless, a respondent is well advised that corroborating evidence should not be considered merely superfluous or optional. The proof,

indeed, the provision of corroborating evidence is not optional, and respondent must satisfy their affirmative duty to corroborate their claim to the degree they can, or otherwise reasonably explain their failure to do so. Matter of B-B-, 22 I&N Dec. 309 (BIA 1998). See also Matter of S-M-J-, 21 I&N Dec. 772 (BIA 1997). The weaker an applicant's testimony comes with the greater the need for corroborating evidence. Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998). The Court notes that at this juncture, the rules pertaining to corroboration are the same for asylum as they are for withholding under the Act as well as withholding under the Torture Convention. Compare 8 C.F.R. Section 1208.13(a) with 8 C.F.R. Section 1208.16(b) and 8 C.F.R. Section 1208.16(c)(2).

The finding of credible testimony by an asylum applicant, however, is not dispositive of whether relief should be granted. See Matter of E-P-, 21 I&N Dec. 860 (BIA 1997). The Court must consider the applicant's statutorily eligibility in light of the evidence in the record of proceedings.

Returning to the issue of credibility, this Court considers many factors in assessing the credibility of those who appear before it. This may include the witness's opportunity and capacity to observe an

event, the omission of facts and against the witness's testimony, enter only inconsistencies and discrepancies in the witness's testimony, internal inconsistencies and discrepancies in the witness's administrative re-filed application and a supplemental updated application, prior inconsistent statements, the inherent probability in the witness's testimony, contradictory evidence, or the lack of corroborating evidence. While omissions of facts in an asylum application or during testimony might not in and of themselves, as support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies can and does provide a specific basis and cogent reason to support an adverse credibility finding. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998) .

In the instant case, I have considered the rationality, internal consistency and inherent persuasiveness of the respondent's testimony in reaching my conclusion with regard to the respondent's credibility. I have also considered the respondent's testimony as well as his written applications for relief of asylum and withholding under the Act. I find that the respondent is not credible. I find that respondent's testimony contains internal inconsistencies and that his testimony and

his written applications for relief of asylum and withholding under the Act are inconsistent and these inconsistencies are critical. Moreover, I find that respondent's testimony omits certain key events and details of his alleged claims of persecution that were set forth in his application.

In support of this Court's adverse credibility finding, this Court points to several significant inconsistencies and omissions. First, this Court notes that the respondent specifically testified in response to a question proffered not only by his attorney on direct examination but also by this Court, that he did not belong to any organizations or groups. Yet, in the respondent's supplemental or updated or corrected application (See Exhibit 3), respondent specifically stated in response to part B question 3A "Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, affirmative rights group, or the press or media?" "Yes." Indeed, the respondent went on the state "yes, we belong to pro-Albanian groups in our city. We had meetings at our house and attended meetings at

other houses where the Albanian language and history was taught." Now respondent attempts to explain this inconsistency by stating that when asked this question that he either misunderstood the question or that he thought that the question was asking about his activities personally, and that in his testimony he was speaking to the activities of his uncle's and father and other family members. Respondent basically went on to say that he was not a member of any group. Yet, this Court has listened carefully to this respondent's presentation of his testimony. While much has been made by respondent's counsel of the youthful age at which respondent left what is now Serbia-Montenegro, this Court has considered that in assessing his explanations for his inconsistencies and omissions. This Court finds that the respondent is well spoken, has a complete if not extremely fluent grasp of the English language. The Court notes that while the respondent was at a youthful age (14-years-old) at the time of his departure, that the record will bear out that if you believe the respondent's testimony, he was able to set forth what occurred with respect to his alleged mistreatment and his family in some in quite articulate fashion. Therefore, this Court does not accept the respondent's explanation that he

misunderstood this question. This question was asked on the application and the question was asked by his counsel. The question was also asked by this Court. The respondent indicated that he was not involved in any groups. Yet, this is inconsistent with the respondent's supplemental application found at Exhibit 3 and it is also inconsistent with the administratively filed application found at Exhibit 2 wherein he states in response to part C, question 2, the answer "yes" to whether he and his family had ever belonged to any groups. Furthermore, respondent's explanation that he did not believe the question on the application was asking for any information as to his personal involvement in any groups, is further undermined by the respondent's continued explanation that what he may have been referring to when he did say yes in his written application was the groups in which his grandmother and others taught the Albanian language. Indeed, this is set forth in response to that question. This statement by the respondent clearly indicates to this Court that the respondent understood what that question meant, his testimony that he did not belong to any groups versus what he put in his application is inconsistent.

Further undermining the respondent's testimony and credibility is his testimony regarding his arrival in the United states. Respondent stated on multiple occasions that he arrived first with the soccer team in Canada. He was subsequently smuggled in the back of a semi-truck "by myself' (i.e., alone) into the united States and again, respondent stated this multiple times. Yet, in his supplemental application (in particular in the statement, four pages in length submitted in support of that application), respondent stated "after about one and one half months in Albania, around September 5, 1999, I was able to travel to Canada with a youth soccer team. From Canada, I went to the United States with the team by hiding in the back of a semi-truck, around September 9, 1999." Again, respondent's explanation for this inconsistency is that perhaps he made a mistake. Respondent's counsel's explanation for these inconsistencies are the youthful age of the respondent. The Court further notes the respondent is now a 20-year-old individual. Respondent has been represented by counsel through out his proceedings. The explanation for the inconsistence in his written application that he arrived in the United States with the team by hiding in the semi-truck versus his testimony that he

arrived alone, occurred after the respondent was clearly past the age of adulthood in 2003, when the supplemental application was tendered to this Court.

Further undermining the respondent's testimony and credibility is the respondent's testimony regarding the exact incident that allegedly precipitated his flight from what is now Serbia-Montenegro. Respondent specifically stated to this Court that he and his uncle were arrested at his uncle's house while he was watching a soccer game on television. Respondent then went on to state on direct examination in response to clear and specific questions by his counsel, that he and his uncle traveled to a military camp/prison by truck and that he and his uncle were then taken to separate dark rooms. Respondent indicated that he was in this room alone for approximately one to one and a half hours. Thereafter, two men came into the room followed by an additional individual, at which point in time respondent was harassed, interrogated regarding the whereabouts of his father, and beaten. Yet, in his supplemental application and the statement submitted in support of that application (see Exhibit 3, page 3 of the statement), respondent states "The soldiers put us in a military truck and took us to a military camp. There were about 10 to 15 other

Albanians there already. They put us in a small room with no lights. They kept us there about 4 to 5 hours before they released me." This statement from the respondent's written application at Exhibit 3 is inconsistent with the respondent's testimony regarding this alleged imprisonment on June 6, 1999 in several respects. First, the Court notes a key omission in the respondent's testimony. At no time during his direct examination or during cross examination did the respondent make any mention that upon arrival of this military camp/prison, that there were about 10 to 15 other Albanians present. At no time did the respondent ever state on direct examination or cross examination that he was taken first to a cell where there were 10 to 15 other Albanians present. It was only at the conclusion of his testimony, when this Court was questioning the respondent regarding what occurred at the prison, that the respondent apparently spontaneously recalled that there were 10 to 15 other Albanians present and that he was first taken to this cell where these individuals were present. The Court finds this omission in the respondent's direct examination to be significant. Even if this Court were to overlook the omission, the written application (regarding the incident wherein in respondent and uncle were taken

to the military camp or prison) is still significantly inconsistent with the respondent's testimony. Indeed, the respondent simply stated in his written statement that they put "us" in a small room with no lights. He goes on to state "they kept us there about 4-5 hours before they released me." At no time in his supplemental application or indeed in his administrative application (see Exhibits 2 and 3) did the respondent ever make mention that he and his uncle were separated and placed in individual separate dark cells where he remained for about an hour to an hour and a half. Indeed, a comparison of his written testimony versus what he put in his supplemental application (see Exhibit 3) indicates that while he testified that he and his uncle were separated and that he was beaten in this room, there is no mention of any beating occurring in this June 6, 1999 incident at the military camp. The respondent did place in the written application that on June 6, 1999, soldiers grabbed his uncle and hit his uncle in his legs with force. He did state that when he attempted escape his uncle's home that he (the respondent) was punched and kicked by the police with police batons and that they bruised his ribs. However, it is clear that when you review the respondent's written statement, respondent then goes

on to recite the incidents that occurred at the military camp. This Court has already quoted that the only thing that the respondent stated occurred at the military camp was that he was placed in a room with 10 to 15 other Albanians; that they put them in a small room with no lights, and that they kept them there for 4 to 5 hours "before they released me." At no time in the written statement did the respondent make mention of being beaten, kicked in the stomach and hit with sticks while at the military prison, as he testified to.

Further undermining the respondent's credibility was the respondent's testimony regarding his contact with his mother. The respondent initially testified to this Court multiple times that the last contact that he had with his mother was approximately 6 months ago and that his mother was in a hospital in Croatia. The record will bear that the respondent stated that the mother was at a hospital in Croatia at least two times. However, respondent subsequently changed his testimony and indicated that mother was in Albania in the hospital. Perhaps the Court could overlook this inconsistency, however, it cannot do so in light of the several other inconsistencies and numerous omissions enumerated above.

Finally, respondent's testimony was completely undermined and his credibility was damaged by his recitation of events regarding his father's alleged arrest by the military police or Serbian police. Respondent first testified that his father was first arrested at the beginning of 1998. The Court notes that in neither of his amended supplemental application or his administratively filed application (see Exhibits 2 and 3) did the respondent make any mention of any arrest that occurred at the beginning of 1998. Giving respondent every benefit of the doubt, the respondent testified at first that his father was arrested in the beginning of 1998 (although this did not appear in either of his written applications) and that his father was perhaps subsequently arrested some time in 1999. The record will bear out that it is clear that the respondent could not keep his testimony consistent with respect to the number of times that his father was arrested or taken by the Serbian police. When questioned by this Court as to why respondent placed in his administrative application that his father was lion two occasions in the month of March and May of 1999 the Serbian police came to the house and took my father for questioning," respondent's explanation for why he placed this in his administratively filed application

and did not testify to this is simply not plausible. The respondent's explanation was first that perhaps he was mistaken as to the dates, then he stated that he forgot. The record will bear out that respondent's explanations for these inconsistencies are simply not plausible and in and of themselves are not consistent in that he either says he forgot or he misunderstood the question. The important point and the most important point regarding the alleged father's arrest or interrogations (however you wish to characterize it) is that while the respondent clearly testified that his father was arrested and/or taken in for interrogation (depending upon which version of the respondent's testimony you believe) once or twice, the Court notes that in reviewing the respondent's supplemental application (which this Court gave the respondent an opportunity to correct or change), no where in that supplemental application (see Exhibit 3)" does respondent state that his father was arrested or taken or caught by the police or Serbian military. Indeed, a review of that application indicates that the respondent stated in response to part B question 2 that asked "Have you or your family members ever been charged, arrested, detained, interrogated, convicted, and sentenced, imprisoned in any other country other than the United States?" the

respondent stated yes. However, the respondent went on to state "my uncle and I were arrested and beaten for helping ethnic Albanians flee Yugoslavia and enter Albania. The military police came to our house two to three times in March 1999, but my father was away from the house helping Albanians to flee the country. The first time the police came was in late 1998 [not as respondent testified] or early 1999. The last time they came while I was there was about 2 weeks after my June 6, 1999 arrest and beating. The military and police were looking for my father, but I left the country before they found him." It is clear that upon review of the respondent's updated/supplemental application, that nowhere in that application does it say that the respondent's father was ever arrested taken and interrogated or even caught by the police. Indeed, by the very quote set forth above by this court, it appears that respondent's father was never caught or taken by the police. This is a serious inconsistency between the respondent's testimony and his written applications for relief and protection.

In light of the foregoing, this Court finds that respondent is not credible. In addition, this Court finds an absolute lack of corroborating evidence of the type that this Court would reasonably expect. While

the respondent proffered one document that was admitted into the record as part of Exhibit 4, tab D, (allegedly from the independent state of Kosovo, or the Kosovo Liberation Army) that the respondent's father had been actively involved in the support of Kosovo refugees, the authentication of the foundation of this document was not established to this Court's satisfaction. All the respondent testified to was that his distant cousin "Nick or Nic or Nik," brought this document to respondent in the year 2002. Respondent testified to this Court that his cousin Nick resides in the Northern part of Michigan. However, his cousin Nick is currently apparently on vacation in Serbia-Montenegro. What is most important, is that this Court does not have any testimony from Nick nor any document or affidavit or statement from Nick indicating that he indeed obtained this document from respondent's father or from anybody in Serbia Montenegro. Moreover, while the respondent has testified that he has had contact with his mother and father, there is not a single statement or affidavit from his mother or father corroborating his claims. This would be particularly important to this Court with respect to the father, in light of the fact that the respondent indicates his alleged mistreatment was a result of the father's activities. Yet, the respondent

indicates that he has a contact number to reach the father and indeed attempts to reach the father weekly. The respondent testified that his most recent contact with his father was August 24, 2005. However, the respondent admitted that he didn't ask for a statement from his father until August 24, 2005. When this Court asked the respondent for an explanation as to why he would wait until August 24, 2005, to ask the father for a sworn statement, the respondent testified essentially that he didn't know he needed one or that he wasn't aware that such would be necessary until August 24, 2005. However, this is undermined by the respondent's admission to this Court that when he was interviewed on his administratively filed application that the asylum officer indeed asked the respondent whether he had a statement by the father. Taking into consideration the "youthful" age of this respondent, at the time that the interview may have occurred, the respondent was able to, at his hearing today, articulate and recall that he was in fact asked by the asylum officer whether he had a statement from the father. This should have put the respondent on notice that such a statement would have been important in this case. Yet this Court has no such statement.

Based upon the inconsistencies, omissions, and the complete lack of corroborating statements from any family member (particularly the father, or the cousin Nick), this Court finds the respondent is not credible.

Even if this Court finds that the respondent was credible, this Court finds that respondent has essentially testified to one detention that lasted approximately 4 to 5 hours and if you believe the respondent's testimony, resulted in a beating wherein he was hit twice with a stick, punched in the stomach, kicked in the stomach and kicked in the back. Respondent admitted to this Court that his family did not take him to seek medical treatment out of alleged fear that perhaps the mother would be caught. This Court does not find that this single incident in and of itself, even if you believe that somehow a nexus has been established between that arrest (if you believe the arrest occurred) and the father's alleged political activities on behalf of ethnic Albanians, rises to the level of persecution. The Court notes that while there is no universally accepted definition of persecution, the meaning of persecution as developed through United States case law contemplates harm or suffering inflicted an individual in order to punish him or hope for

possessing a belief or characteristic a persecutor seeks to overcome. Persecution within the meaning of the Act, however, does encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Indeed, the persecution feared by an asylum applicant must be more than mere harassment, brief confinement, or interrogation. See In Re A-E-M-, 21 I&N Dec. 1157 (BIA 1998). In the instant case, we have one brief detention lasting anywhere from 4 to 5 hours to a maximum of one day (whether you believe the respondent's testimony or one of his written applications) that possibly resulted in one beating of which the respondent did not have any resulting medical treatment. This Court finds that such does not rise to the level of persecution.

Even if this Court did find that such a single incident of brief confinement and harassment (taking into account respondent's testimony that he was unable to learn his Albanian language and history) constitutes persecution, the Court finds that country conditions have changed in Serbia-Montenegro. Indeed, many of the events that occurred, occurred while Milosevic was in power in the former Federal Republic of Yugoslavia, Milosevic is no longer in power. Indeed, the country condition information of record indicates (see Exhibit 6, the 2004 U.S.

Department of State Country Report) that there were no political killings, there were no reports of politically motivated disappearances, and there were no reports of political prisoners. While there was and still exists some general political upheaval in Serbia-Montenegro, this Court does not find that such undermines the significant change in country conditions and improvements that have occurred in Serbia-Montenegro with respect to ethnic Albanians. The Court further notes that while the respondent has indicated that he has had contact with his mother and father and that his father travels between Kosovo and the city of Tuzi, where he and his family resided, the respondent does not have any information that any harm has come to the family. Now, the respondent has stated in his testimony that he does not believe that his family has told him of such harm. Nonetheless, this record is completely devoid of any evidence that any harm has come to the mother and father since the respondent's departure to the united States. It is well established Board precedent that when family remains in the alleged country of persecution without being harmed, that the alleged claim of persecution is significantly undermined. See Matter of In Re A-E-M-, supra.

Even if this Court finds that respondent has been able to rebut the changed country conditions, the Court finds the respondent does not have a well-founded fear of persecution based upon or arising out of the severity of past persecution or humanitarian reasons. In the instant case, we have one detention of a brief confinement and an alleged beating that occurred during that brief confinement. This, in this Court's conclusion, does not rise to the severity of past persecution necessary to grant asylum for humanitarian reasons. Indeed, in the Matter of N-M-A, 22 I&N Dec. 312 (BIA 1998), the Board of Immigration Appeals found that the applicant in that case had failed to establish compelling reasons arising out of the severity of past persecution for being unwilling to return to Afghanistan where in that case, the applicant stated or testified or presented evidence that he suffered beatings during a month-long detention and the disappearance and likely death of his father. The incidents that we have in this case in no way rise to the level of the incidents that were set forth in Matter of N-M-A-,wherein the Board found that a month-long detention and beatings during that month-long detention and the disappearance and likely death of the applicant's father did not rise to

the level of severity of past persecution that would give rise to a granting of asylum for humanitarian reasons. This case does not even come close to presenting similar facts as that in Matter of N-M-A wherein the Court again rejected a claim based upon compelling reasons wherein the applicant had set forth far more serious or severe alleged persecution than this applicant has set forth in the instant case.

It necessarily follows that since respondent cannot establish his burden of proof based upon credibility and on the merits of his claim for asylum, that he also fails to meet the higher burden necessary for a grant of withholding under the Act. Therefore, this Court will deny both the respondent's applications for asylum and withholding of removal under the Act.

Withholding under the Torture Convention

This Court is in the Sixth Circuit, and therefore also must make an assessment of the respondent's claim of torture independently, with respect to his credibility. With respect to the respondent's credibility, the Court has already enunciated the respondent's inconsistencies with respect to the alleged one incident of arrest and beating. Indeed, the respondent, while his counsel

had made much of the fact that he was individual of young at the time of this alleged arrest and beating, is not credible on that claim. Specifically, the respondent inconsistently testified with his written supplemental updated application (of which he was given an opportunity to amend or change), in that the respondent testified that he and his uncle were separated and that he was questioned in a dark room. This is inconsistent with his written application wherein he states that they were taken to the military camp where they were perhaps in a room with 10 to 15 other Albanians and that they were placed in a dark room. Moreover, while the respondent testified that he was beaten (kicked in the stomach, punched in the stomach, hit with a stick twice and kicked in the back), in his written statement in support of his supplemental application, nowhere does respondent make any mention of any such beatings at the military camp or prison. Therefore, even if this Court were to find that this single incident of an arrest and an alleged beating constituted torture (which this Court does not find that this single incident alone constitutes torture as defined by the regulations), this Court finds that the respondent is not credible as to a torture claim.

As stated above, this Court finds that this single incident of brief confinement and beating that did not result in any injuries other then a bruised rib of which the respondent sought no medical treatment, does not constitute torture, it does not rise to the level of torture as contemplated by the regulations and defined by the regulations and therefore we deny the respondent's torture claim on the matter of credibility and on the merits of that claim.

ORDERS OF THE COURT

IT IS THEREFORE ORDERED that respondent's application for asylum be denied;

IT IS FURTHER ORDERED that respondent's application for withholding of removal under the Act be denied;

IT IS FURTHER ORDERED that respondent's application for withholding under the Torture Convention be denied;

IT IS FURTHER ORDERED that respondent be removed to Serbia-Montenegro on the charge contained in the Notice to Appear (Admitted into the record as Exhibit 1).

/s/ Marsha Kay Nettles
MARSHA KAY NETTLES
Immigration Judge

(5)

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File Date:
Sept 15 2008

No. 08-61

In the Supreme Court of the United States

FLAMOR DJOKOVIC, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in not providing additional explanation for its rejection of petitioner's contention that he was eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B).

2. Whether the failure of the Board of Immigration Appeals to provide petitioner with the final corrected transcript of an immigration judge's oral decision violated the Due Process Clause under the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is not published in the *Federal Reporter* but is reprinted in 273 Fed. Appx. 505. The decisions of the Board of Immigration Appeals (Pet. App. B1-B4) and the immigration judge (Pet. App. C1-C40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2008. The petition for a writ of certiorari was filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of

Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). Under the Attorney General's regulations, an alien who has demonstrated that he has suffered past persecution "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1). That presumption may be rebutted, however, if an immigration judge (IJ) makes certain specified findings. As pertinent here, the regulations provide that the presumption of a well-founded fear of future persecution that arises when an alien demonstrates that he has been subject to past persecution is rebutted if the government establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality." 8 C.F.R. 1208.13(b)(1)(i)(A); see 8 C.F.R. 1208.13(b)(1)(ii).

The Attorney General's regulations also provide that there are limited circumstances in which an IJ may grant asylum where an alien has demonstrated past persecution but the government has succeeded in rebutting the presumption of a well-founded fear of future persecution that arises from that showing. Subject to certain exceptions not at issue here, the regulations state that

an IJ has "discretion" to grant asylum in those circumstances "if:

> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to [his or her] country [of nationality] arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. 1208.13(b)(1)(iii)(A) and (B); see *In re A-T-*, 24 I. & N. Dec. 296, 298 (B.I.A. 2007).

2. Petitioner is a native of the former Federal Republic of Yugoslavia who entered the United States in 1999 without authorization or inspection. Pet. App. A1, A3-A4. On March 8, 2000, petitioner applied for asylum and withholding of removal. *Id.* at A4.

3. a. On April 19, 2000, the former Immigration and Naturalization Service initiated removal proceedings against petitioner. Pet App. C2. In proceedings before an IJ, petitioner admitted the factual allegations contained in the Notice to Appear and conceded removability, but he renewed his applications for asylum and withholding of removal and also sought protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

On August 30, 2005, the IJ issued an oral decision. Pet. App. C1-C40. Based on petitioner's concessions, the IJ concluded that petitioner's "removability ha[d] been established by the requisite clear and convincing evidence." *Id.* at C3. The IJ also determined that peti-

tioner was not eligible for asylum or withholding of removal, see *id.* at C17-37, or protection under the CAT, see *id.* at C37-C39.[1]

The IJ identified several reasons for denying petitioner's application for asylum. First, the IJ found that petitioner "[was] not credible." Pet. App. C19; see *id.* at C33. The IJ stated that petitioner's testimony "contain[ed] internal inconsistencies," *id.* at C19, that his testimony and his written application for asylum were "inconsistent" in "critical" respects, *id.* at C19-C20, and that the record reflected "an absolute lack of corroborating evidence of the type that this Court would reasonably expect," *id.* at C30.

Second, the IJ stated that "[e]ven if [she were to] find[] that [petitioner] was credible," Pet. App. C33, she would still deny petitioner's application for asylum on the ground that the treatment identified by petitioner did "not rise to the level of persecution" within the meaning of the INA, *id.* at C34. The IJ explained that petitioner had identified "one brief detention lasting anywhere from 4 to 5 hours to a maximum of one day * * * that possibly resulted in one beating [from] which [petitioner] did not have any resulting medical treatment." *Ibid.*

Third, the IJ stated that "[e]ven if [she were to] find that such a single incident of brief confinement and harassment * * * constitute[d] persecution," she would still deny asylum on the ground that "country conditions ha[d] changed in" respondent's former home in what was then Serbia-Montenegro. Pet. App. C34. The IJ explained that "many of the events" described by peti-

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[1] Petitioner does not renew his claims for withholding of removal or protection under the CAT before this Court.

tioner in support of his application for asylum had "occurred while [Slobodan] Milosevic was in power" and that a 2004 State Department Country Report indicated "that there were no political killings, * * * [and] no reports of politically motivated disappearances * * * [or] political prisoners." *Id.* at C34-C35.

Finally, the IJ stated that petitioner had not shown that he had "a well-founded fear of persecution based upon or arising out of the severity of past persecution or humanitarian reasons." Pet. App. C36. With respect to the latter, the IJ determined that the events recounted by petitioner, even if assumed to be true, "in no way rise to the level of the incidents that were" involved in *In re N-M-A-*, 22 I. & N. Dec. 312 (1998), where the Board of Immigration Appeals (BIA or Board) concluded "that a month-long detention and beatings * * * and the disappearance and likely death of the applicant's father did not rise to the level of severity of past persecution that would give rise to a granting of asylum for humanitarian reasons." Pet. App. C36-C37.

b. Petitioner filed an administrative appeal to the BIA, which "adopt[ed] and affirm[ed]" the IJ's decision. Pet. App. B1-B4. With respect to the IJ's adverse credibility determination, the Board stated that petitioner had failed to provide a "sufficient explanation" or a "persuasive argument" with respect to several of the inconsistencies identified by the IJ. *Id.* at B3. The BIA further stated that petitioner had "offered little substantive challenge" regarding the IJ's finding that the conduct petitioner had identified, "even if it took place, would [not] have risen to the level of persecution." *Id.* at B4. Finally, although it "recognize[d] that Serbia and Montenegro formally split from each other in 2006," the Board stated that petitioner "ha[d] also not sufficiently

countered the [IJ's] finding that conditions have changed in Serbia-Montenegro." *Id.* at B4 & n.1.

4. a. Petitioner sought judicial review of the BIA's decision. In his brief to the court of appeals, petitioner noted that the final Administrative Record (A.R.) with which he had been provided in connection with his petition for judicial review contained two written versions of the IJ's original oral decision, one of which was signed and contained handwritten changes and one of which was unsigned and contained no handwritten changes. Pet. C.A. Br. 14. Petitioner asserted that he had been "only provided the unsigned and unchanged Oral Decision in the proceedings before the BIA" and that "[t]he changes made to the signed Oral Decision are numerous and are significant." *Ibid.* Petitioner identified four specific differences: one involved the definition of "torture" under the CAT (*id.* at 15 (citing A.R. 62)), one changed the word "admissions" to "omissions" in the context of discussing the legal standards for making credibility determinations (*ibid.* (citing A.R. 64)), and two were contained in the section of the IJ's decision that set forth the basis for the IJ's first reason for denying asylum—that is, the conclusion that petitioner was not credible (*ibid.* (citing A.R. 67, 74)). Petitioner argued to the court of appeals that "[i]f the BIA based its decision on the signed and changed decision, then the parties were deprived of due process and the BIA violated its own regulations." *Id.* at 14. He also argued that the BIA and the IJ had erred in rejecting his application for asylum. *Id.* at 16-30.

b. The court of appeals denied the petition for review in a unanimous unpublished opinion. Pet. App. A1-A23. With respect to petitioner's due process claim, the court concluded that two of the handwritten changes identified

by petitioner were not significant because the first involved the correction of an "obvious" mistake and the second "made little difference in practice given the surrounding context and * * * the accompanying citation, which referenced the language contained in the corrected copy." *Id.* at A10. The court described the other two changes--which both involved correcting previous misquotations of petitioner's testimony—as "very troubl[ing]," and it stated that "[i]f the IJ had actually relied on the inaccurate quotations in making her adverse credibility f[i]ndings, this court would be very troubled." *Id.* at A11. The court stated, however, that "[]that does not seem to be the case." *Ibid.* With respect to one of the corrections, the court noted that "the IJ accurately quoted [petitioner's] testimony" on the same point at two other places in the original version of the decision. *Ibid.* With respect to the other, the court concluded that, even in the original written version of the decision, "one could easily glean the factual basis of and reasoning behind the IJ's adverse[] credibility finding on that matter." *Ibid.*

The court of appeals stated that it is generally "a bad practice for a judge to continue working on his opinion after the case has entered the appellate process." Pet. App. A12 (quoting *Mamedov* v. *Ashcroft*, 387 F.3d 918, 920 (7th Cir. 2004)). The court determined, however, that an alien who claims that he was deprived of due process in a removal proceeding "must show error *and* substantial prejudice," *id.* at A9 (citation omitted) (emphasis added), and that petitioner "ha[d] failed to explain how he was *prejudiced* by not having" a copy of the final signed transcript of the IJ's oral decision while his case was before the BIA, *id.* at A12. The court explained that "if the BIA relied on the uncorrected deci-

sion," then petitioner "was not prejudiced because he had the opportunity to point out any mistakes to the BIA." *Ibid.* "On the other hand, if the BIA relied on the corrected version of the judgment," the court stated that petitioner had likewise not demonstrated prejudice because: (i) his brief to the BIA "questioned only the underly[ing] reasoning of the IJ and did not refer to any of the particular mistakes [petitioner] now identifies in the uncorrected copy"; and (ii) none of "the changes to the judgment [was] substantive." *Ibid.* The court stated that although it "deplore[d] an administrative process that failed to provide the parties with corrected copies of the IJ's decision, it is clear that the outcome of the case * * * would have been no different" had corrected copies been provided. *Id.* at A13.

The court of appeals also rejected petitioner's claim that the BIA erred in denying his application for asylum. Pet. App. A14-A21. The court concluded that "[t]he [IJ's] finding that [petitioner] did not have a well-founded fear of persecution based on * * * changed country conditions * * * was * * * supported by substantial evidence," *id.* at A19, and it affirmed on that "narrow ground[]," *id.* at A15. As a result, the court deemed it unnecessary to review the IJ's "adverse credibility finding or her finding that the alleged events did not []rise to[] the level of persecution." *Ibid.* The court also concluded that the IJ had not abused her discretion "in denying [petitioner's] request for asylum on humanitarian grounds." *Id.* at A21.

ARGUMENT

Petitioner contends (Pet. 12-17) that the court of appeals erred in "fail[ing] to consider whether [he was] entitled to humanitarian asylum based not on the sever-

ity of the past persecution but because there is a reasonable possibility that he will suffer 'other serious harm'" if removed from the United States. Pet. 12 (quoting 8 C.F.R. 1208.13(b)(1)(iii)(B)). Petitioner also contends (Pet. 17-20) that if the BIA relied on the final signed transcript of the IJ's oral decision in deciding his appeal, the manner in which his case was resolved violated the Due Process Clause. Further review is not warranted. The court of appeals' decision is correct, and petitioner does not assert, and has not shown, that it conflicts with any decision of this Court or of another court of appeals.

1. Petitioner's contention that the court of appeals erred in failing to address separately in its unpublished decision whether he may be eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) is without merit and does not warrant further review.[2]

a. The court of appeals quoted both subsections of 8 C.F.R. 1208.13(b)(1)(iii) in its decision, see Pet. App. A20, and it stated that "we cannot hold that the IJ abused her discretion in denying [petitioner's] request for asylum on humanitarian grounds," *id.* at A21. Petitioner does not assert that that ultimate conclusion was erroneous.

b. Petitioner is correct that the court of appeals did not separately explain why it had concluded that the IJ had not abused her discretion in denying asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B). But petitioner never articulated an argument that he should be granted asylum on

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[2] Petitioner errs in framing the issue as whether he is "entitled to" asylum. Pet. 12. Asylum is always a discretionary form of relief, see 8 U.S.C. 1158(b)(1)(A), and the specific regulation upon which petitioner relies provides that asylum "may be granted" on the specified grounds "in the exercise of the decision-maker's discretion." 8 C.F.R. 1208.13(b)(1)(iii).

the ground "that there [was] a reasonable possibility that he * * * may suffer other serious harm upon removal" (8 C.F.R. 1208.13(b)(1)(iii)(B)) that was in any way independent of his contention that he had a "well-founded fear of [future] persecution" (8 C.F.R. 1208.13(b)(1)). Instead, in his briefs to both the BIA (A.R. 21-22) and the court of appeals (Pet. C.A. Br. 29-30), petitioner simply cited 8 C.F.R. 1208.13(b)(1)(iii)(B), a United Nations Convention that discusses its origin, a Tenth Circuit decision that quotes the regulation, and a portion of this Court's decision in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987), that discussed the meaning of "well-founded fear," a phrase that does not appear in Section 1208.13(b)(1)(iii)(B) of the regulations. Because petitioner's arguments regarding the two issues were functionally identical, the court of appeals' earlier conclusion that the IJ had not erred in "finding that [petitioner] did not have a well-founded fear of [future] persecution" (Pet. App. A19) had thus effectively disposed of petitioner's claim for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) as well.[3] It was therefore not inappropriate for the court of appeals, in the circumstances of this case and in the context of an unpublished opinion, to limit its separate additional discussion to 8 C.F.R. 1208.13(b)(1)(iii)(A), which, unlike Section

[3] See Pet. App. A19 (stating that petitioner "did not submit any individualized evidence that would tend to show that he would remain a target for persecution despite the[] changed country conditions"); see also *Souw* v. *Mukasey*, No. 06-72938, 2008 WL 3843506, at *6 (9th Cir. Aug. 19, 2008) (stating that "[t]he evidence of changed country conditions effectively rebutted the presumption that [petitioner] would suffer future persecution," and that the BIA had not "erred in determining that [an alien] was not eligible for asylum pursuant to [8 C.F.R.] 1208.13(b)(1)(iii)(B)").

1208.13(b)(1)(iii)(B), does not require an alien to demonstrate that he may suffer future harm upon removal.

c. Petitioner does not assert that the decision of the court of appeals in this case conflicts with the court of appeals decisions cited at pages 15 and 16 of the petition for a writ of certiorari. In any event, the circumstances of those cases were significantly different from those presented here. In *Mohammed* v. *Gonzales*, 400 F.3d 785, 789, 802-803 (2005) (see Pet. 15), the Ninth Circuit granted a petition for review and remanded with directions for the BIA to grant an alien's motion to reopen her removal proceedings based on its conclusion that the alien had received ineffective assistance of counsel in the initial removal proceedings. In the course of doing so, the court simply remarked that "[e]ven if the presumption of a well-founded fear of future persecution were rebuttable, [the alien] might still succeed in obtaining asylum on remand" under 8 C.F.R. 1208.13(b)(1)(iii)(A) or (B). *Mohammed*, 400 F.3d at 801.

In *Liti* v. *Gonzales*, 411 F.3d 631 (2004), the Sixth Circuit did not "remand" (Pet. 16) at all. Instead, it concluded that it lacked jurisdiction to consider an alien's claim that she was eligible for asylum under the then-recently promulgated 8 C.F.R. 1208.13(b)(1)(iii)(B) because that claim had not been presented to the BIA. *Liti*, 411 F.3d at 642. The court then stayed entry of its order dismissing the alien's petition for review in order "to allow the BIA the opportunity to reopen the case and consider the [aliens'] new claim." *Ibid.*[4]

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[4] Even if there were some conceivable tension between the Sixth Circuit's decision in *Liti* and its unpublished decision in this case, that tension would be a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

d. Further review is not warranted for two other reasons as well. A case-specific claim that a court of appeals failed, in an unpublished decision, to provide a full explanation for its rejection of one of an alien's numerous assignments of error does not merit an expenditure of this Court's certiorari resources. There is no requirement that a court of appeals expressly address every assertion of error when it affirms the decision under review. And, in any event, such a claim would have been more appropriately dealt with by way of a petition for rehearing.

In addition, it is extremely unlikely that petitioner would be found to be eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) in any event. In order for petitioner to be eligible for asylum under that provision, it would not be enough for the court of appeals to conclude "that there is a reasonable possibility that [petitioner] * * * may suffer other serious harm upon removal." 8 C.F.R. 1208.13(b)(1)(iii)(B). Rather, the court would *also* need to resolve in petitioner's favor two other antecedent issues that it did not resolve in its decision below (see Pet. App. A15): whether the IJ and the BIA erred in concluding that petitioner was not credible (see *id.* at B2-B4, C17-C33) and that the events petitioner recounted, even if deemed credible, would not establish that he suffered *past* persecution (see *id.* at B4, C33-C34).

2. Petitioner also renews his contention that "[i]f the BIA based its decision on the signed and changed [IJ] decision, then the parties were deprived of due process and the BIA violated its own regulations." Pet. 18. As the court of appeals correctly recognized (Pet. App. A9), however, petitioner could not obtain relief on such a claim without demonstrating that he was prejudiced by his failure to receive a copy of the final signed transcript

of the IJ's oral decision until after the BIA had resolved his appeal. Petitioner fails to challenge either the premise that he was required to establish prejudice or the court of appeals' conclusion that "it is clear that the outcome of [his] case * * * would have been no different" had he been provided with such a copy. *Id.* at A13. Instead, petitioner asserts that the court of appeals "exceeded the scope of its authority" in resolving the prejudice issue itself rather than remanding to the BIA. Pet. 20.

a. A remand would have been appropriate had there been any plausible claim that petitioner suffered prejudice as a result of his failure to receive a copy of the final signed transcript of the IJ's decision. But the court of appeals did not exceed the bounds of its authority in determining that a remand was unnecessary under the circumstances of this case. Petitioner did not even argue to the court of appeals that he had suffered any tangible prejudice, and the court of appeals determined that the IJ had not "actually relied on" any of the altered text identified by petitioner in reaching her decision. Pet. App. A11.[5] In addition, none of the differences between the two versions of the IJ's decision identified by petitioner is contained in the portion of the opinion that the court of appeals found dispositive—*i.e.*, the conclusion that, regardless of whether petitioner had established past persecution, conditions in his country of origin had changed to the point where he could no longer have a well-grounded fear of future persecution. *Id.* at A15-A19; see pp. 6-7, *supra* (describing changes).

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[5] In contrast, in *Mamedov* v. *Ashcroft*, 387 F.3d 918, 919 (2004) (see Pet. 19)—which the court of appeals cited in its opinion in this case, see Pet. App. A12—the Seventh Circuit concluded that an IJ had made a "substantive change" to the original transcript.

b. This Court's review is also unwarranted because there is no indication that there is a recurring problem with respect to providing aliens with accurate transcripts of oral IJ decisions, and the BIA has recently taken steps to further improve the process of doing so. The Attorney General's regulations provide that removal hearings "shall be recorded verbatim." 8 C.F.R. 1240.9. The regulations further provide that when an IJ's oral decision is appealed to the BIA, the IJ "shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the [IJ] returns to his or her duty station if the [IJ] was on leave or detailed to another location." 8 C.F.R. 1003.5(a). The same regulation provides that the Chairman of the BIA and the Chief Immigration Judge "shall determine the most effective and expeditious way to transcribe proceedings before the [IJ] and take such steps as necessary to reduce the time required to produce transcripts * * * and improve their quality." *Ibid.*

According to the Executive Office for Immigration Review (EOIR), IJs are directed to make only minor typographical or grammatical changes when reviewing the transcripts of their oral decisions. Cf. Pet. App. A13 (describing alterations identified by petitioner as "cosmetic changes fixing errors that [petitioner] did not deem significant enough to mention in his brief[]to the BIA"). This Office has been informed by EOIR that, in its experience, IJs rarely make any changes at all. As a result, and in order to reduce delays in processing time, EOIR further reports that the BIA's practice is to serve the initial transcript simultaneously on both the IJ and the parties and to set a briefing schedule at the time of that service. When the BIA receives the final signed transcript from the IJ, the Board reviews it to ensure

that any changes simply correct minor transcription or grammatical errors. If the BIA determines that the IJ has made substantive changes to the original transcript, the Board's general practice is to remand the case to the IJ with directions to issue a new decision and serve it on the parties. It is also the Board's practice to state in such remand orders that the decision returned to the Board was not the decision the parties were given an opportunity to appeal and to remind the IJ that any revisions to the transcript of a previously rendered oral decision should be limited to minor editing of the order. In contrast, when the Board determined that the IJ had made no changes or only minor changes, the Board's previous practice was to place the final signed copy of the IJ's decision in the administrative record and to make it available to the parties upon request.

According to EOIR, the process described above has saved thousands of hours of processing time in cases involving aliens who have been detained during their removal proceedings. The Board issues approximately 3500 decisions in such cases each year.[6] EOIR advises that, under the procedures described above, the BIA is able to process appeals in cases involving detained aliens more than three weeks faster than would be the case if it were to await the final signed version of the transcript before distributing it to the parties and issuing a briefing order.

In EOIR's judgment, the process described above proved successful in the vast majority of cases. EOIR also reports, however, that the Board has recently implemented a practice of uniformly providing the final

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[6] See Executive Office for Immigration Review, *FY 2007 Statistical Year Book* at X1 (Apr. 2008) <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>.

signed copy of the IJ's decision to the parties whenever the IJ makes any changes after reviewing the initial transcript, and that this change will be reflected in the *Board of Immigration Appeals Practice Manual.* The fact that the procedures that generated this particular case have already been changed provides an additional reason why further review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008